UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. LOUIS CARDINALS, LLC

Case 14-CA-213219

and

JOE BELL, an Individual

RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent St. Louis Cardinals, LLC ("Respondent" or "Cardinals"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, respectfully files the following exceptions to the October 17, 2018 Decision of Administrative Law Judge ("ALJ") Arthur A. Amchan.[1]

I. The ALJ Erroneously Rejected Respondent's Assertion That the Charging Parties' Internal Union Charges Lacked Protection Due to The Unlawful Section 8(b)(1)(B) Object of Those Charges.

A. The Charging Parties Need Not Be Agents of a Labor Organization to Lose the Protection of the Act.

In support of its contention that the internal union charges of Joe Bell, Thomas Maxwell, James Maxwell, and Eugene Kramer ("Charging Parties") lacked the Act's protection, without regard to whether they were agents of a labor organization, Respondent excepts:

1. To the conclusion that "Section 8(b) applies [only] to labor organizations and their agents. The Board has never held that rank and file union members can violate 8(b)." (See D.6:43-

[1] References to the ALJ's Decision are identified by the letter "D" followed by page and line number, e.g., "D. ___." References to the hearing transcript are by the letters "TR", followed by page and line number, e.g., "TR ___:___." References to exhibits introduced by the General Counsel are by the letters "GC", followed by exhibit number, e.g., "GC-___". References to exhibits introduced Jointly are by the letter "J", followed by exhibit number, e.g., "J-___." Finally, references to exhibits introduced by the Cardinals are by the letters "R-" followed by exhibit number, e.g., "R-__ ."

44.) This conclusion is contrary to law and disregards the distinction between a loss of protection and a violation of Section 8(b).

2. To the conclusion that *Bovee and Crail Construction Co.*, 224 NLRB 509 (1976) does not govern and is distinguishable from this proceeding, since this conclusion is contrary to law.

3. To the conclusion that *Preferred Building Services*, 366 NLRB No. 159 (Aug. 28, 2018) and *Consolidated Communications*, 367 NLRB No. 7 (Oct. 2, 2018) are off point, to the ALJ's failed attempt to distinguish them and to the ALJ's failure to follow these Board decisions (D.7: fn. 7), since the ALJ's conclusion and his failure to follow these Board decisions are contrary to law.

B. Respondent's Painting Foreman, Patrick Barrett, is a Section 8(b)(1)(B) Representative.

In support of its contention that Respondent's Painting Foreman, Patrick Barrett, is a Section 8(b)(1)(B) representative, Respondent excepts:

4. To the ALJ's failure to find that the Cardinals' Painting Foreman, and in particular Barrett, is a Section 8(b)(1)(B) representative.

5. To the ALJ's failure to find that the CBA between the Cardinals and the union expressly names the Painting Foreman as the Step One representative of the Cardinals for purposes of the adjustment of grievances which arise under the CBA (GC-2, Sec. 3, p.6), since this failure ignored the substantial and material evidence in the record.

6. To the finding that Barrett had not been formally designated as the Cardinals' grievance adjustment representative on December 4, 2017 (D.7:4-5), since this finding is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

7. To the ALJ's failure to find that Barrett attended the January 9, 2018 meeting with the union (D. 4:1-5) as a grievance representative of the Cardinals, since this failure ignored the substantial and material evidence in the record.

8. To the ALJ's failure to find that during the January 9, 2018 meeting with the union, Barrett and the Cardinals, the union asked that Barrett at least consider the union hiring hall's out of work list, since this failure ignored the substantial and material evidence in the record.

9. To the ALJ's failure to find that, in making the hiring decisions attacked in this proceeding, Barrett did consult the union hiring hall's out of work list (RX-11) and did consider whether the painters he wanted to hire appeared on this list, since this failure ignored the substantial and material evidence in the record.

10. To the finding that, at the Joint Trade Board meeting of February 21, 2018, it was not clear as to the scope of Barrett's grievance adjustment authority (D.7: fn. 8), since this is contrary to the substantial evidence in the record, and is unsupported by the record.

11. To the ALJ's failure to find that, although only one formal grievance has been filed against the Cardinals during Barrett's tenure as Painting Foreman, Barrett has adjusted workplace grievances as they have arisen, since this failure ignored the substantial and material evidence in the record.

12. To the finding that, when the Charging Parties filed the internal union charges, they had no way of knowing that Barrett would be the Cardinals' grievance adjustment representative (D.7:1-3, fn. 8), since this is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

13. To the ALJ's failure to find that, over the years while he was Painting Foreman, Billy Martin frequently adjusted workplace grievances, since this failure ignored the substantial and material evidence in the record.

C. The Charging Parties' Conduct Lacked Protection Because They Filed and Pursued Internal Union Charges With an Unlawful Section 8(b)(1)(B) Object of Reversing Respondent's Selection of Barrett as Painting Foreman.

In support of its contention that the Charging Parties' conduct lacked protection because they filed and pursued internal union charges with an unlawful Section 8(b)(1)(B) object of reversing Respondent's selection of Barrett as Painting Foreman, Respondent excepts:

14. To the conclusion that the filing of internal union charges by the Charging Parties was not rendered unprotected because they were seeking the unlawful object of Barrett's removal as Painting Foreman (D.5, fn. 6), since this conclusion ignores and is contrary to law establishing that their objective made their activities unprotected.

15. To the ALJ's failure to find that the object of the internal union charges filed by the Charging Parties was to restrain and coerce the Cardinals in its selection of its representatives for the purposes of the adjustment of grievances, since this failure ignored the substantial and material evidence in the record.

16. To the conclusion that the Cardinals' principal defense was that the Charging Parties engaged in protected conduct in bad faith (D.6:32-33), since this conclusion is contrary to the entire record: the Cardinals never asserted that the Charging Parties' bad faith was a defense. While the Cardinals did assert that the Charging Parties' bad faith was evidence of their pretextual explanations for their conduct), the Cardinals' two principal defenses throughout these proceedings were as follows: (i) that the General Counsel could not and did not submit a *prima facie* case since the Charging Parties did not engage in any protected conduct, and (ii) the Cardinals

would have made the same decisions on offering/not offering employment even if the Charging Parties had not engaged in protected conduct.

17. To the ALJ's failure to find that all explanations offered by the Charging Parties for filing internal union charges, other than that their object was to restrain and coerce the Cardinals in its selection of its representatives for the purposes of the adjustment of grievances, were pretextual given their own conduct in performing non-union painting work and given the timing of the internal union charges filed, since this failure ignored the substantial and material evidence in the record.

18. To the conclusion that there is no credible evidence that Joe Bell had violated the union's by-laws or acted in bad faith (D.6:37-38), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

19. To the ALJ's failure to find that Bell admitted to Barrett that he had performed non-union work while a member of the union and gave Barrett his telephone number for purposes of securing more non-union painting work (TR 134, 297), since this failure ignored the substantial and material evidence in the record.

20. To the finding that there was no credible evidence that Bell performed painting work for non-union companies while a member of the union (D.3:fn.2), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

21. To the conclusion that the Cardinals' position is inconsistent with *Elevator Constructors (Otis Elevator Co)*, 339 NLRB 1122 (2003), since this conclusion is contrary to law.

22. To the ALJ's failure to conclude that the conduct of the Charging Parties was unprotected because they sought to cause a violation of Section 8(b)(1)(B) of the Act, or lost protection for other reasons, since the failure to so conclude is contrary to law.

II. The ALJ Erroneously Rejected Respondent's *Wright Line* Rebuttal Defense That It Would Have Taken the Same Actions Absent Any Purportedly Protected Activities.

In support of its rebuttal defense under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) ("*Wright Line*"), Respondent excepts:

23. To the conclusion that the "same decision" rebuttal defense, as articulated in *Wright Line*, and reaffirmed many times, is not applicable where an employer admits that protected, concerted activity played "a little bit" of a role in a hiring decision (D. 5:25 to D.6:7), since this conclusion is contrary to law.

24. To the conclusion that *Wright Line* and other case law require a conclusion of a violation of the Act where an employer admits that protected, concerted activity played "a little bit" of a role in a hiring decision (D. 6:1-7), since this conclusion is contrary to law.

25. To the conclusion that the Cardinals' explanations for not recalling the Charging Parties are pretextual (D.6:12-13), since this is contrary to the substantial evidence in the record, is unsupported by the record, and irrelevant to a rebuttal defense.

A. Respondent Would Have Taken the Same Actions Absent Any Purportedly Protected Activities Because Barrett Acted as Sole Decision Maker and was Unbound by Any Past Practices or Other Particularized Legal Obligations.

In support of its contention that Respondent would have taken the same actions absent any purportedly protected activities because Barrett acted as sole decision maker and was unbound by any past practices or other particularized legal obligations, Respondent excepts:

26. To the ALJ's failure to find that, upon being appointed Painting Foreman by the Cardinals, Barrett was given free reign to hire, in his judgment, the best painting crew he could find (TR 313), since this failure ignored the substantial and material evidence in the record.

27. To the finding that Billy Martin generally recalled the same painters for seasonal work, year after year and that Barrett continued this practice for painters who had not filed internal

union charges against him (D.4:23-25), since this finding is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

28. To the ALJ's failure to find that Barrett was under no obligation to hire in the same manner as Billy Martin, since this failure ignored applicable law and the substantial and material evidence in the record.

29. To the ALJ's failure to find that the Collective Bargaining Agreement (hereinafter "CBA") (GC-2) between the Cardinals and the union gave the Cardinals (and all employers) the non-mandatory option to access the union's hiring hall when hiring decisions were needed, since this failure ignored the substantial and material evidence in the record.

30. To the ALJ's failure to find that Barrett had no knowledge of the November 2 and November 6, 2017 exchange of correspondence between the Cardinals and James Maxwell, Thomas Maxwell and Eugene Kramer (hereinafter "Kramer") authorizing background checks, in which it was noted that such authorization was necessary because these three individuals would work for the Cardinals in 2018, since this failure ignored the substantial and material evidence in the record.

31. To the ALJ's failure to find that the Cardinals and Joe Bell (hereinafter "Bell") did not exchange correspondence in which any intention was expressed that Bell would work for the Cardinals again in 2018, since this failure ignored the substantial and material evidence in the record.

32. To the ALJ's failure to draw adverse inferences from the General Counsel's failure to recall James Maxwell, Thomas Maxwell, Kramer and Bell to deny allegations and testimony adverse to their interests and the interests of General Counsel.

33. To the conclusion that the Cardinals, by Barrett, unlawfully discriminated against the four Charging Parties (D.6:9-10), since this conclusion is contrary to law.

B. Respondent Would Have Taken the Same Actions Regarding Charging Party Thomas Maxwell Absent Any Purportedly Protected Activities Because It Took No Adverse Action Against Him.

In support of its contention that Respondent would have taken the same actions with regard to Thomas Maxwell absent any purportedly protected activities because it took no adverse action against him, Respondent excepts:

34. To the ALJ's failure to find that Thomas Maxwell suffered no adverse action, since this failure ignored the substantial and material evidence in the record.

35. To the ALJ's failure to find that Barrett's February 5 and 8, 2018 offers of employment to Thomas Maxwell were made nearly contemporaneously with the offers to Ochs and Burns, and consistently with the timing of offers to Thomas Maxwell in prior years, which was a function of the timing of when the ballpark was scheduled to open for the St. Louis Cardinals' first home game of the season, since this failure ignored the substantial and material evidence in the record.

36. To the conclusion that Barrett's February 5 and 8, 2018 job offers to Thomas Maxwell did not detract from alleged evidence that the Cardinals discriminated against Thomas Maxwell by not offering him employment earlier (D.6:25-30)), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

C. Respondent Would Have Taken the Same Actions Regarding Charging Party James Maxwell Absent Any Purportedly Protected Activities Because Barrett Possessed Legitimate and Unrebutted Concerns about his Willingness to Work for Barrett and about Maxwell's Work Performance.

In support of its contention that Respondent would have taken the same actions regarding James Maxwell absent any purportedly protected activities because Barrett possessed legitimate

and unrebutted concerns about his willingness to work for Barrett and about Maxwell's work performance, Respondent excepts:

37. To the finding that it is unclear exactly what Hosei Maruyama (hereinafter "Maruyama") told Barrett about the conversation in which James Maxwell told Maruyama that he (James Maxwell) could not work for Barrett (D. 3:2-3), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

38. To the finding that Barrett had difficulty recalling the exact date of the conversation in which Maruyama conveyed to him that James Maxwell could not work for Barrett (D. 3:5-6), since this finding is irrelevant, contrary to the substantial evidence in the record, and is unsupported by the record.

39. To the ALJ's failure to find that: (i) Maruyama conveyed to Barrett that James Maxwell had stated he could not work for Barrett; (ii) James Maxwell subsequently told Maruyama that he would "bite his lip and try to make it work" (TR 258); and (iii) Barrett naturally and logically found James Maxwell's subsequent statement insufficient (TR 325-26).

40. To the finding that there was no evidence that Barrett had made offers of employment to anyone before learning that James Maxwell had told Maruyama that he would "bite his lip and try to make it work", since this finding is incomplete and has no legal or logical relevance.

41. To the ALJ's discrediting Maruyama's explanation (D. 4, fn. 4) that his "actions have consequences" comment referred to James Maxell's statement that he (James Maxwell) could not work for Barrett, rather than to other actions, since this is contrary to the substantial evidence in the record and is unsupported by the record.

42. To the finding that Maruyama's "actions have consequences" comment implied that the Charging Parties would not be recalled to work (including Thomas Maxwell who was, in fact, recalled to work thereafter) because they had filed internal union charges against Barrett (D. 4:10-13), since this is contrary to the substantial evidence in the record and is unsupported by the record.

43. To the conclusion that Maruyama's "actions have consequences" comment violated Section 8(a)(1) of the Act (D. 5:1-16; 7:20-24), since: those "actions" were not protected by the Act; the ALJ erred in rejecting Maruyama's explanation of this comment (Exception No. 41); the comment did not tend to coerce Thomas Maxwell in the exercise of his Section 7 rights; and the comment, in fact, did not deter Thomas Maxwell or the other three painters in prosecuting internal union charges against Barret and/or in appealing the fine assessed by the union against Barrett which they thought was insufficient.

44. To the conclusion that Maruyama implicitly told Thomas Maxwell that the internal union charge was "the reason" the Charging Parties would not be offered work for the Cardinals in 2018 (D.6:10-12), since this is contrary to the substantial evidence in the record, and is unsupported by the record.

45. To the ALJ's failure to find that Maruyama played no role in deciding which painters Barrett hired in 2018, since this failure ignored the substantial and material evidence in the record.

46. To the ALJ's failure to find that James Maxwell was, in Barrett's opinion, not a good painter or employee, performed sloppy work and had unprofessional work habits (including sleeping on the job and returning to work after using marijuana on lunch breaks) (TR 321-24), since this failure ignored the substantial and material evidence in the record.

47. To the ALJ's failure to find that James Maxwell sat through and heard all of the Exception No. 43 evidence, yet he failed to re-take the stand to deny any of this evidence against him, since this failure ignored the substantial and material evidence in the record.

D. Respondent Would Have Taken the Same Actions Regarding Charging Party Eugene Kramer Absent Any Purportedly Protected Activities Because Barrett Possessed Legitimate and Unrebutted Concerns about Kramer's Work Performance.

In support of its contention that Respondent would have taken the same actions regarding Eugene Kramer absent any purportedly protected activities because Barrett possessed legitimate and unrebutted concerns about Kramer's work performance, Respondent excepts:

48. To the ALJ's failure to find that Kramer was, in Barrett's opinion, not a good painter or employee, performed sloppy work, and had unprofessional work habits (including returning to work after using marijuana on lunch breaks) (TR 295-96, 326-27), since this failure ignored the substantial and material evidence in the record.

49. To the ALJ's failure to find that Kramer failed to re-take the stand to deny the Exception No. 48 evidence against him, since this failure ignored the substantial and material evidence in the record.

50. To the ALJ's failure to explain his conclusion that Barrett's reasons for not offering employment to Kramer and James Maxwell were pretextual (D.6:12-13), since this failure ignored the substantial and material evidence in the record.

E. Respondent Would Have Taken the Same Actions Regarding Charging Party Joe Bell Absent Any Purportedly Protected Activities Because Barrett Undisputedly Knew That Bell Was Already Then-Employed at Busch Stadium With One of the Cardinals' Painting Contractors in Bell's Preferred Specialty Line of Work.

In support of its contention that Respondent would have taken the same actions regarding Joe Bell absent any purportedly protected activities because Barrett undisputedly knew that Bell

was already then employed at Busch Stadium with one of the Cardinals' painting contractors in Bell's preferred specialty line of work, Respondent excepts:

51. To the ALJ's failure to find that to Barrett's knowledge, Bell was a steel painter, not accustomed to the type of detailed painting needed to be done by the Cardinals (TR 131, 298), that Bell was already working at the Stadium in the 2018 offseason for a painting contractor of the Cardinals (TR 132, 327-28), all of which made it illogical for Barret to offer work to Bell in 2018, since this failure ignored the substantial and material evidence in the record.

52. To the conclusion that Barrett's explanation for not offering employment to Joe Bell is obviously pretextual (D.6:15), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

53. To the finding that, if a painter was offered seasonal work by the Cardinals while employed elsewhere that he/she would leave the other job to accept the Cardinals' offer (D. 2:22-24), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

54. To the conclusion that Barrett did not know whether the painters to whom he had offered employment were working at the time of his offers and that Barrett knew that in the past seasonal painters obtained releases from their employers to perform seasonal work for the Cardinals (D. 6:16-19), since this conclusion is contrary to the substantial evidence in the record and is unsupported by the record.

55. To the finding that neither Mark Ochs (hereinafter "Ochs") nor Mickey Burns (hereinafter "Burns") were hired via the union's hiring hall (D. 4:30-31), since this finding is contrary to the substantial evidence in the record and is unsupported by the record.

56. To the finding that Duane Oehman was the only painter hired through the union's hiring hall (D. 4:32-33), since this finding is contrary to the substantial evidence in the record, and is unsupported by the record.

57. To the ALJ's failure to find that, prior to offering employment to Ochs and Burns, Barrett consulted the union hiring hall's out of work list (RX-11) and learned they were not working, since this failure ignored the substantial and material evidence in the record.

58. To the ALJ's conclusion that Barrett's reasons for not offering Bell 2018 work were incredible (D.3, fn. 2), since this conclusion is contrary to the substantial evidence in the record, and is unsupported by the record.

59. To the ALJ's failure to find that Bell failed to re-take the stand to deny any of this evidence against him, since this failure ignored the substantial and material evidence in the record.

60. To the ALJ's failure to conclude, assuming *arguendo* the Charging Parties engaged in conduct protected by the Act, that the Cardinals would have made the same decision on the timing of the job offer to Thomas Maxwell, and would have made the same decision not to make job offers to James Maxwell, Kramer and Bell, since the failure to so conclude is contrary to law and contrary to the substantial evidence in the record.

III. The Unlawful Objects of the Charging Parties' Internal Union Charges and Respondent's *Wright Line* Rebuttal Defense Each Independently Defeat the General Counsel's Allegations.

In support of its contention that both the unlawful objects of the Charging Parties' internal union charges and Respondent's *Wright Line* rebuttal defense defeat the General Counsel's allegations, Respondent excepts:

61. To the ALJ's conclusion that the Cardinals violated Sections 8(a)(1) and (3) of the Act by not offering the Charging Parties employment in 2018 (D. 5:18-19) since the Charging Parties activities were not protected by the Act, and, hence General Counsel failed to submit a

prima facie case of violation of Sections 8(a)(1) and (3) of the Act; the Cardinals carried their burden of proving that the same decisions re offers of employment would have been made, even if any of the Charging Parties had engaged in activities protected by the Act; and the Cardinals did offer employment to Thomas Maxwell, a fact found by the ALJ (D. 4:35-37).

62. To the conclusion that the Cardinals violated Sections 8(a)(1) and (3) of the Act via the timing of the job offer to Thomas Maxwell and via the failure to recall or rehire James Maxwell, Kramer and Bell in 2018 (D. 7:16-18), since these conclusions are contrary to law and unsupported by the record.

63. To the ALJ's failure to recommend dismissal of the Complaint, as amended, in its entirety, since the failure to so recommend is contrary to law and contrary to the substantial evidence in the record.

IV. The ALJD Contains Additional Erroneous Factual Findings.

In order to correct additional erroneous factual findings contained in the ALJD, Respondent excepts:

64. To the ALJ's repeated misidentification of James Maxwell as "Joseph" or "Joe" Maxwell (D. *passim*) since this is contrary to the substantial evidence in the record.

65. To the finding that former foreman Billy Martin was one of two full time painters employed by the Cardinals and that, since 2010, James Maxwell was the other full time painter (D. 2:12-13) since this is contrary to the substantial evidence in the record and is unsupported by the record.

66. To the ALJ's crediting of James Maxwell and inferentially discrediting Patrick Barrett (D. 2, fn. 1) that James Maxwell had never worked full time for the Cardinals, since this is contrary to the substantial evidence in the record and is unsupported by the record.

V. The ALJD Erroneously Issued a Recommended Order and Remedies.

Because the ALJ erred in both the issuance of a Recommended Order and Remedies, and with regard to the specific remedies contained therein, Respondent excepts:

67. To the issuance of any Remedy (D.7:25 to D. 8:22) since any Remedy is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record.

68. To the issuance of any recommended Order (D. 8:24 to D. 10:8)) since any Order is contrary to law and contrary to the substantial evidence in the record, and is unsupported by the record.

69. To the ALJ's proposed remedy that Respondent compensate Thomas Maxwell, James Maxwell, Eugene Kramer, and Joe Bell for any adverse tax consequence of receiving a lump-sum backpay award as prescribed in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), because this remedy exceeds the Board's remedial authority. (D. 8:16-19).

70. To the ALJ's proposed remedy that Respondent compensate Thomas Maxwell, James Maxwell, Eugene Kramer, and Joe Bell employee due backpay with interest compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), because this remedy exceeds the Board's remedial authority. (D. 8:1-13).

71. Respondent excepts to the ALJ's proposed remedy that Respondent compensate the Charging Parties for search-for-work and interim employment expenses (D. 9:19-21) because search-for-work and interim employment expenses are a normal and routine aspect of employment in this industry, and this remedy exceeds the Board's remedial authority if such expenses exceed interim earnings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2018 I filed the foregoing RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION via the National Labor Relations Board's E-File system and served via Federal Express to the following parties:

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